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DEPARTMENT OF COMMERCIAL LAW.

EDITOR-IN-CHIEF,

FRANK P. PRICHARD, Esq.,

Assisted by

H. GORDON MCCOUCH,

CHARLES C. BINNEY,

CHARLES C. TOWNSEND, FRANCIS H. BOHLEN,

OLIVER BOYCE JUDSON.

TITUS *v.* POOLE.¹ SUPREME COURT OF NEW YORK, GENERAL
TERM, 1894.

1. *Sale—Express warranty.*

At the time of transfer of bank stock to plaintiff as a part of the price of land conveyed by him, the grantee stated that the bank was organized under the laws of Pennsylvania; that the stock was worth 100 cents on the dollar; and that it was good, high dividend paying stock. Held an express warranty that the stock was worth its face value, and that the bank was duly organized as stated.

2. *Same—Implied warranty.*

Where a paper purporting to be a certificate of stock in a bank legally organized, is sold as such, there is an implied warranty that the certificate is genuine, and what it purports to be.

3. *Same—Evidence.*

In an action for breach of warranty in a contract of sale of bank stock that the bank was solvent, evidence as to the condition of the bank four years after the sale is incompetent, the question involved being the solvency of the bank at the time of the sale.

WARRANTY.

Warranty is a contract of indemnity made by the seller of goods in favor of the buyer, to protect the latter against a failure of one or more terms of the sale and is collateral to the main contract.

Warranty is the same as guaranty, only the latter is made with reference to the solvency of the person.

I. *Consideration.* The contract of warranty, like other con-

¹ Reported in 73 Hun. 383.

tracts, requires a sufficient consideration to support it: *Benjamin on Sales*, § 611.

But an offer to warrant when the parties commence negotiating might be sufficient, although some days elapse before a final consummation of the bargain: *Wilnot v. Hurd*, 11 Wend. 584.

A warranty in a printed catalogue of an auction sale would not ordinarily enter into the sale, if the auctioneer at the sale and in the presence of the purchaser distinctly announces that the seller warrants nothing: *Craig v. Miller*, 22 Up. Can. C. P. 349.

Still more obviously the warranty made after a sale has been fully made and completed, and not before promised or understood, is invalid unless there be a new consideration: *Hogins v. Plympton*, 11 Pick. 99; *Bloss v. Kittridge*, 5 Vt. 28; *Towell v. Gatewood*, 2 Scan. 24; *Summers v. Vaughan*, 35 Ind. 323; *Morehouse v. Comstock*, 42 Wis. 626.

If a warranty has been promised at the sale, and one is subsequently given, even after the sale is completed, it is not void for want of consideration: *Cole v. Weed*, 68 Wis. 428.

If, however, the warranty be given at any time before the sale be fully completed, it is valid. Thus, when the goods were ordered and delivered, but no price fixed, and afterwards, when the price was finally agreed upon a warranty was given, it was held valid: *Vincent v. Leland*, 100 Mass. 432.

The question of consideration usually arises only in express warranties, as implied warranties always arise, if at all, at the time of sale, hence the consideration always exists; whereas, express warranties may be made before or after the sale, and a slight new consideration will always suffice: *Porter v. Poole*, 62 Ga. 238.

Thus, where the goods were not delivered at the proper time, justifying the vendee in refusing to accept them, and the seller said if the buyer would accept he would warrant them against freezing, this was held binding: *Conger v. Chamberlain*, 14 Wis. 258.

When an agent, by an oral contract, sells and delivers the goods of a disclosed principal, his personal oral warranty of

quality is not a contract independent of the contract of sale, but is a part of it, and one consideration is sufficient to support the sale and warranty: *Johnson v. Trask*, 116 N. Y. 136.

A warranty is an incident only to a completed sale: *Osborne v. Gantz*, 60 N. Y. 540; *Zimmerman v. Morrow*, 28 Minn. 367; *James v. Bokage*, 45 Ark. 284.

It also follows that a warranty given after a sale has been made is void, unless some new consideration be given for the warranty. The consideration already given is exhausted by the transfer of the property in the goods without a warranty, and there is nothing to support the subsequent agreement to warrant, unless a new consideration be given: *Roscorla v. Thomas*, 3 Q. B. 234.

2. *A warranty may be either express or implied.* An express warranty is an affirmation by the seller of a material fact concerning the goods sold, made under such circumstances that the buyer has a right to rely upon, and does rely upon them. It is immaterial that the seller did not intend to make a warranty: *Pasly v. Freeman*, 3 Term. Rep. 51; *Hawkins v. Pemberton*, 51 N. Y. 198; *Reed v. Hastings*, 61 Ill. 266.

In order to constitute a warranty upon a sale, it is not necessary that the representations should have been intended by the vendor as a warranty. If the representation is clear and positive—not a mere expression of opinion—and the vendee understands it as a warranty, and, relying upon it, purchases, the vendor cannot escape liability by claiming that he did not intend what his language declared: *Hawkins v. Pemberton*, 51 N. Y. 198; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 265.

Any affirmation of an existing fact, distinctly and positively made, in negotiations for trade is deemed a warranty: *Sweet v. Bradley*, 24 Barb. 549.

A warranty is a collateral undertaking and forms a part of the contract by the agreement of the parties: *Benjamin on Sales*, § 610; and this is essential to its validity: *Vincent v. Leland*, 100 Mass. 432; *Wilmot v. Hurd*, 11 Wend. 584; *Conger v. Chamberlain*, 14 Wis. 258; *Summers v. Vaughn*, 35 Ind. 323; *Bryant v. Crosby*, 40 Me. 9.

If a sale of property is complete and perfect by the terms of

the written contract of sale, a subsequent warranty is void, unless some new consideration be given to support it. A warranty to be effectual must be intended as such by the parties : *Bryant v. Crosby*, 40 Me. 9 ; *Summers v. Vaughn*, 35 Ind. 323.

The right of a buyer of goods to sue upon the seller's special warranty of their quality, accrues immediately upon the failure of the warranty, without returning the goods, or giving any notice to the seller : *Vincent v. Leland*, 100 Mass. 432.

Where the alleged warranty is oral, it is for the jury under proper instructions from the court, to decide upon the terms of the contract and the existence of the ingredients necessary to constitute a warranty : *Conger v. Chamberlain*, 14 Wis. 258.

3. *No particular form of words is necessary.* Any words which manifest the intent of the parties : *Wilbur v. Cartwright*, 44 Barb. 536 ; *Chapman v. Murch*, 19 Johns. 290 ; *Grieb v. Cole*, 60 Mich. 397 ; *Holman v. Dord*, 12 Barb. 336 ; *Folger v. Chase*, 18 Pick. 66 ; *Beeman v. Buck*, 3 Vt. 53 ; *Roberts v. Morgan*, 2 Cow. 438 ; *Henshaw v. Robbins*, 9 Met. 83.

Any representation of the state of the thing sold, by the defendant, or direct, express affirmation by him of its quality or condition, showing his intention to warrant, will be sufficient : *Duffee v. Mason*, 8 Cow. 25 ; *Chapman v. Murch*, 19 Johns. 290.

A warranty will not be implied from loose conversations between the vendor and vendee, in which the vendor may praise his goods, or express his opinion as to their qualities, or the advantages that may result to the vendee from the purchase. No expression of opinion, however strong, would import a warrant. But if the vendor affirms a fact, as to essential qualities of the goods it amounts to an express warranty : *Henshaw v. Robbins*, 9 Metc. 83.

The expression of an opinion by the seller that logs sold will yield a certain amount of merchantable lumber, is not a warranty, where the buyer examines for himself : *Fauntelroy v. Wilcox*, 80 Ill. 477 ; *Byrne v. Jansen*, 50 Cal. 624.

A representation involving a question of law is necessarily an opinion : *Duffany v. Ferguson*, 66 N. Y. 482.

In *Baker v. Hendrickson*, 24 Wis. 509 the purchaser of trees

saw them taken from the ground, and packed after long exposure. The seller assured him that they would not suffer after long exposure to the air before they were packed. Upon these facts it was held that there was no warranty. Dickson, C. J., said, "It is obvious that they were but mere expressions of opinion, not intended as a warranty, nor so understood. So in *Carondolet Iron Works v. Moore*, 78 Ill. 571, the description of iron sold as mill iron, was held no warranty that it was such, but a mere opinion, because the buyer had examined it before contracting: *Falkner v. Lane*, 58 Ga. 116; *Robinson v. Harvey*, 82 Ill. 58; *Bryan v. Crosby*, 40 Me. 9; *Lindsey v. Davis*, 30 Me. 406; *Bond v. Clark*, 35 Vt. 577.

It is not always easy to determine whether certain language does or does not imply a warranty. Much will depend upon the situation of the parties and the condition of things when the language is used, and to which it will apply. It is certain that the word warrant need not be used, nor any other of precisely the same meaning. It is enough if the words actually used impart an understanding on the part of the owner that the chattel is what it is represented to be, or an equivalent to such understanding: 1 *Pars. Cont.* 463; *Roberts v. Morgan*, 2 Cowen, 438; *Mason v. Chappell*, 15 Grat. 572; *Warren v. Philadelphia Coal Co.*, 83 Pa. 437; *Thorne v. McVeigh*, 75 Ill. 81; *Patrick v. Leach*, 80 Neb. 530.

Every affirmation at the time of the sale of personal chattels amounts to a warranty. This seems to be now settled, notwithstanding the old case of *Chadler v. Lopus*, Cro. Jac. 4, as to the sale of Bezoar Stone. It was so decided in *Osgood v. Lewis* and *Berrikins v. Beran*, 3 Rawle, 23, and in *Power v. Barham*, 4 Adolp & Ellis, 473, and even in New York, where, in other respects, the doctrine of *Chandler v. Lopus* is adhered to. It has been held, nevertheless, that any representation of the thing sold, or direct affirmation of its quality and condition, showing an intention to warrant, is sufficient to amount to an express warranty: *Chapman v. Murch*, 19 Johns. 290; *Sweet v. Colgate*, 20 Johns. 196.

In the case of *Warren v. Philadelphia Coal Co.*, it was held, "no special form of words is necessary. The word warrant,

though it is the one generally used, is not so technical that it may not be supplied by others:" See *Legett v. Sands Ale Brewing Co.*, 60 Ill. 158; *Wheeler v. Read*, 36 Ill. 81.

If a party makes representations which amount to a warranty, he cannot avoid their effect by showing that he did not intend to warrant: *Smith v. Justice*, 13 Wis. 600.

Some of the older Pennsylvania cases are very strict in their requirements as to the language that will constitute a warranty. In *Weatherill v. Neilson*, 20 Pa. 448, soda-ash was sold, the seller's agent representing it, as he was authorized to do, to contain "48 per cent. English test." The court refused to admit testimony to show that the ash was far below 48 per cent. English test, and this was sustained on writ of error on the ground that there was nothing in the representations of the agent, or the authority given him, to justify a finding of warranty.

4. *If the affirmation alleged to be a warranty, is in writing and is unambiguous, the construction of the contract is for the court:* *Edwards v. Marcy*, 2 Allen, 486, 490; *Henshaw v. Robbins*, 9 Metc. 83; *Rice v. Codman*, 1 Allen, 377; *Berrekens v. Bevi*, 3 Rawle, 23; 1 *Thompson on Trials*, § 1196; *Daniels v. Aldrich*, 42 Mich. 58.

When the meaning of the terms used in a written contract is ascertained, the effect and interpretation of the instrument are to be determined by the court, as a matter of law, and cannot be changed or controlled by evidence of the understanding of the parties or the community: *Hutchinson v. Booker*, 5 M. & W. 535; *Rice v. Codman*, 1 Allen, 380.

When a bill of parcels is given upon a sale of goods describing the goods, or designating them by a name well understood, such bill is to be considered as a warranty that the goods sold are what they are thus described or designated to be. And this rule applies, though the goods are examined by the purchaser at or before the sale, if they are so prepared and present such an appearance as to deceive skillful dealers: *Henshaw v. Robbins*, *supra*.

5. *If the affirmation is ambiguous, it is a question for the jury whether the parties understood it as a warranty or mere*

expression of opinion, commendation, or praise: 1 *Thompson on Trials*, § 1197, 98; *Cook v. Mosley*, 13 Wend. 277; *Edwards v. Marcy*, 2 Allen, 486.

"A warranty may be oral or written. When it is reduced to writing it is the province of the court to expound it; but when it is merely verbal, it is for the jury to interpret the words of the witness who testifies concerning it. The court may explain to the jury what constitutes a warranty, when it rests altogether on oral proof; but as no particular form of words is essential and it is mostly a question of intention of both the vendor and vendee, that question, like any other question of fact, must be left to the jury:" *Lindsey v. Davis*, 30 Mo. 406-420.

The rule is, that whenever the vendor, at the time of sale, makes an assertion or representation, respecting the kind, quality or condition of the thing sold, upon which he intends that the vendee shall rely, and upon which the vendee does rely in making the purchase, it amounts to a warranty: *Lamme v. Gregg*, 1 Metc. 144; *Smith v. Miller*, 2 Bibb. (Ky.) 617; *Duffie v. Mason*, 8 Cowen, 25; *Vemon v. Keyes*, 8 East. 632-639; *Morrill v. Wallace*, 9 N. H. 111; *Foggert v. Blackweller*, 4 Ired L. (N. C.) 238.

If, however, the vendor, by what he says, merely intends to express an opinion or belief about the matter, and not to make an affirmation of the fact, the statement will not amount to a warranty: *Henson v. King*, 3 Jones (N. C.), 419; *Rogers v. Ackerman*, 22 Barb. 134; *Osgood v. Lewis*, 2 Harr. & G. (Md.) 485; *Bond v. Clark*, 35 Vt. 577; *Thornton v. Thompson*, 4 Grat. (Va.) 121.

6. *If the contract of sale is in writing, no oral warranty can be shown to vary its terms*: *Benjamin on Sales*, § 621; *Watson v. Roode*, 30 Neb. 264.

This results from the general rule of evidence that no new terms can be added by parol to vary a contract which the parties have reduced to writing: *Frost v. Blanchard*, 97 Mass. 155; *Whitmore v. South Boston Iron Co.*, 2 Allen, 58; *Wilner v. Whipple*, 53 Wis. 298-304; *Shepherd v. Gilroy*, 46 Iowa, 193.

In *Merriam v. Fields*, 24 Wis. 640, 642, the written con-

tract contains certain express warranties. Parol evidence was offered to establish certain other warranties, but the court rejected it, saying that the writing was presumed to express the whole contract as to warranties, and could not be varied or added to by parol; See, also, *Mullain v. Thomas*, 43 Conn. 252.

But parol evidence is admissible to explain a written warranty, for where the sale was by sample, parol evidence was admitted to determine whether the article tendered was equal to the sample: *Hogins v. Plymton*, 11 Pick. 97. And, where the sale was by description, evidence was admitted to determine whether the article delivered answered to the description: *Stoop v. Smith*, 100 Mass. 134.

If the article is sold by a formal written contract, or a regular bill of sale, which is silent on the subject of warranty, no oral warranty made at the same time, or even previously, can be shown, since the writing is conclusively presumed to embody the whole contract. For the same reason no additional warranty can be engrafted on or added to one that is written: *Lamb v. Crafts*, 12 Met. 353; *Reed v. Wood*, 9 Vt. 286; *Boardman v. Spooner*, 13 Allen, 253; *Dean v. Mason*, 4 Conn. 432; *Frost v. Blanchard*, 97 Mass. 155; *McQuaid v. Ross*, 77 Wis. 470; *DeWitt v. Berry*, 134 U. S. 312; *Eighmie v. Taylor*, 98 N. Y. 288; *Jones v. Alley*, 17 Minn. 292.

Thus, where the written warranty was only to the age and soundness of a horse, oral statements as to his "docility" were held not admissible: *Mullain v. Thomas*, 43 Conn. 252.

A written warranty, gratuitously given after a sale, and therefore void, will not limit an oral and different one given at the time of the sale: *Altman v. Kennedy*, 33 Minn. 339.

7. *A general warranty does not usually extend to patent and obvious defects, but such defects may be made the subject of the warranty, if the party so intends: Benjamin on Sales*, 616, 618; *Hill v. North*, 34 Vt. 604; *Williams v. Ingram*, 21 Tex. 300; *McCormick v. Kelly*, 28 Minn. 137; *Bennett v. Buchen*, 76 N. Y. 386.

But it is conceived that if obvious defects are not covered by a general warranty it is simply from the presumption that the

buyer does not rely upon it, which is an essential element to make any warranty binding. In the nature of things, one cannot rely upon the truth of that which he knows to be untrue, and to a purchaser fully knowing the facts in respect to the property, misrepresentation could not have been an inducement or consideration for the purchase, and hence could not have been a part of the contract. But there seems to be no good reason why a warranty may not cover obvious defects as well as others, if the vendor is willing to give it, and the buyer is willing to buy defective property on the assurance of the warranty. If he relies on his own judgment alone, he does not rely on his warranty; if he relies on the warranty alone or in part, he is not without remedy because the infirmities are apparent: *Pinney v. Andrews*, 41 Vt. 631; *First Nat'l Bank v. Grindstaff*, 45 Ind. 158; *Fletcher v. Young*, 69 Ga. 591.

“It is absolutely true, in regard to implied warranties, that no implication of warranty arises when the defect is obvious to the senses, because such defects are, or should be known to the buyer; but the rule may be different as to express, especially as to written warranties specially covering the defect. Such contracts are to be construed most strongly against the warrantor; and, for ought that is known, the warranty was demanded and given expressly to cover existing and known defects. Evidence that the defect was obvious and known to the buyer and so excepted from the operation of the warranty, which in terms is broad enough to cover it, is apparently no less than limiting a written contract by parol agreement. In the one case, the written contract is limited from a mere inference from the facts; in the other, it is controlled by the oral agreement of the parties; in both, the written contract is altered and an effect is given to it different from its obvious meaning on its face. But, if a warranty never covers an obvious defect the rule does not apply unless *the extent*, as well as the mere existence of the disease or defect is also known to the purchaser. If the want of a tail or an ear or a leg of a horse is not covered by a general warranty, yet a defect in the eye, for instance, or a splint on the leg, though visible, may

afterwards prove to be so serious as to be covered by the warranty :” *Shewalter v. Ford*, 34 Miss. 417.

The defect, to be obvious, must be discernible by an ordinary observer examining the property with a view to purchase and not one requiring special skill to detect it : *Birdseye v. Frost*, 34 Barb. 367 ; *Thompson v. Harvey*, 86 Ala. 522 ; *Drew v. Ellison*, 60 Vt. 401 ; *Vates v. Cornelia*, 59 Wis. 615.

Of course, if the seller uses some artifice, conceals defects otherwise visible, or misrepresents a character, his general warranty may cover them : *Kenner v. Harding*, 85 Ill. 264 ; *Chadsey v. Greene*, 24 Conn. 562.

A temporary and curable injury, existing at the sale, but which does not at the time injuriously affect the natural usefulness and fitness of a horse for service, even if it be a fault, is not a breach of warranty of soundness : *Roberts v. Jenkins*, 21 N. H. 116. In *Korngay v. White*, 10 Ala. 255, it was held that any disease, which effects the value of the animal, whether permanent or temporary, is an unsoundness. Approved in *Roberts v. Jenkins*, 21 N. H. 119. But, whether this be so or not, it is clear that disease need not be incurable, in order to be an unsoundness : *Thompson v. Bertrand*, 23 Ark. 731.

Lameness may or may not be unsoundness. If permanent, it is ; if only accidental and temporary, it is not : *Browne v. Bigelow*, 10 Allen, 242.

Ordinarily, a warranty is understood to apply only to the state of things existing at the very time of the sale : *Miller v. McDonald*, 13 Wis. 673 ; *Leggett v. Sands Ale Co.*, 60 Ill. 158 ; *Bowman v. Clumer*, 50 Ind. 10.

8. *Warranties by agents.* Auctioneers, known to be such, have not ordinarily authority to warrant and bind the owner. *Blood v. French*, 9 Gray, 198 ; *Schell v. Stephens*, 50 Mo. 375 ; *Court v. Snyder*, 28 N. E. Rep. 718 ; *Dodd v. Farlow*, 11 Allen, 426.

And generally, it may be said, that a mere special agent “to sell,” has not, in the absence of any express authority, or any usage or custom to that effect, power to warrant and bind the principal in a sale of an article open to inspection : *Cooley v. Perrine*, 41 N. J. Law, 322 ; *Smith v. Tracey*, 36 N. Y. 79 ;

State v. Fredericks, 47 N. J. Law, 469; *Herring v. Shaggs*, 73 Ala. 446.

If the articles are usually warranted when sold by the owner, it may be that an agent to sell may be supposed to have authority to warrant, and to sell in the usual way: *Ahern v. Goodspeed*, 72 N. Y. 108; *Mayor v. Dean*, 115 N. Y. 557; *Kircher v. Conrod*, 9 Mont. 191.

In sales "by sample," it may be that an agent has implied authority to warrant that the property shall be equal to the sample: *Nelson v. Cowing*, 3 Hill, 330; *Randall v. Kehlor*, 60 Me. 47.

But in sales "by sample," the law implies a warranty of similarity, whether the agent does or does not expressly warrant it. This will be more fully treated of under the subject of implied warranties.

In *Upton v. Suffolk County Mills*, 11 Cush. 586, a valuable case, it was distinctly held that a general selling agent, in the absence of any usage or custom to that effect, has no authority to warrant that the flour sold by him shall keep sweet during a sea voyage from Boston to San Francisco, in which it must twice cross the equator. And in *Palmer v. Hatch*, 46 Mo. 585, it was held that an agent to sell whiskey had not authority to warrant against its seizure for former violation of revenue laws. Some American courts certainly seem to hold that a general agent to sell has power to warrant, without any express authority or any custom or usage to that effect, unless he is positively forbidden to warrant: *Deming v. Chase*, 48 Vt. 382; *Murray v. Brooks*, 41 Iowa, 45; *Bierhouse v. Talmage*, 103 Ind. 270; *Flatt v. Osborne*, 33 Minn. 98.

But since a warranty is confessedly no natural or necessary part of a contract of sale, but only a collateral or independent agreement, though given, of course, on the occasion of a sale, it is difficult to see where the agent gets such authority unless expressly or impliedly from the principal, or how a mere authority "to sell" gives power to make another contract, not a necessary or usual part of "selling:" *Wait v. Bone*, 123 N. Y. 604.

Of course, an unauthorized warranty of an agent may be

ratified; but a mere receipt of the proceeds of the sale by the principal, in ignorance of an unauthorized warranty, will not be a ratification: *Smith v. Tracey*, 36 N. Y. 79; *Combs v. Scott*, 12 Allen, 493.

As to what circumstances will be sufficient evidence of an authority to warrant by an agent, see *Smilie v. Hobbs*, 64 N. H. 75; *Churchill v. Palmer*, 115 Mass. 310; *Eadie v. Ashbaugh*, 43 Iowa, 519; *Melby v. Osborne*, 33 Minn. 492.

Implied Warranty may be implied from the acts of the parties or from custom or usages, or may be created by operation of law. The warranty of title is the most sweeping, as by a contract of sale the seller impliedly warrants to sell the goods as absolute owner free from liens and charges, unless the circumstances of the sale show that the seller is transferring only such property as he may have in the goods; *Chalmer's Digest*, § 616; *Dorr v. Fisher*, 1 Cush. 273; *Meriden National Bank v. Gallaudet*, 120 N. Y. 298.

Implied warranties are created by law, or spring from facts arising at the time of sale, from what the parties did rather than what they said. They are contracts to be sure, but silent contracts, and certain rules prevail as to their existence, or non-existence. No implied warranty of quality ordinarily arises where there is an express warranty of some other quality. The demand by the buyer, for one warranty, is supposed to indicate an intention to desire no other. "*Expressio unius est exclusio alterius.*" This is especially enforced where the express warranty is, in writing: *Jackston v. Langston*, 61 Ga. 392; *Baldwin v. VanDeusen*, 37 N. Y. 487; *McGraw v. Fletcher*, 35 Mich. 104; *Mullain v. Thomas*, 43 Conn. 252; *DeWitt v. Berry*, 134 U. S. 313; *Chandler v. Thompson*, 30 Fed. Rep. 38.

But it has been thought in South Carolina that an express warranty of quality does not exclude the implied warranty of title, nor *vice versa*, and that they can subsist together; one a contract by law, the other by the parties: *Trimmier v. Thompson*, 10 S. C. 164; *Wells v. Spears*, 1 McCord, 421.

1. *Title.* It is universally agreed in America also, that in every sale of personal property by one in possession thereof,

selling in his own right as absolute owner, there is an implied warranty of ownership, making him liable if it be not so, whether he made any express assertion of ownership or not, or whether he knew of any defects in his title or not; the sale itself is an assertion of ownership. This applies to sales of incorporeal property, rights, and choses in action, as well as chattels: *Marshall v. Duke*, 51 Ind. 62; *Lindsay v. Lamb*, 24 Ark. 224; *Thurston v. Spratt*, 52 Me. 202; *Shattuck v. Greene*, 104 Mass. 42; *Wood v. Sheldon*, 42 N. J. Law, 421; *Krumbhaar v. Birch*, 83 Pa. 426; *Giffen v. Baird*, 62 N. Y. 229; *Gookin v. Graham*, 5 Humph. (Tenn.) 480.

This implied warranty of title exists although the vendor signs and delivers to the buyer the bill of sale under which he himself acquired his chattels, which is silent on the subject of warranty: *Shattuck v. Green*, 104 Mass. 102.

If his own bill of sale had contained an express warranty of title, and he had assigned the same to his vendee with all the conditions therein described that might amount to an express warranty on his part: *Long v. Anderson*, 62 Ind. 537.

Of course, a warranty of title is a warranty of a free and perfect title; and is broken by any prior incumbrances, mortgages, pledges or liens on the property: *Dresser v. Ainsworth*, 9 Barb. 619.

And whatever amount the vendee may be obliged to pay the prior incumbrances, he can recover of his vendor, or deduct it from the price, if he has not paid for the goods: *Sargent v. Currier*, 49 N. H. 310; *Harper v. Dotson*, 43 Iowa, 232.

If vendor is in possession there is always an implied warranty, if out of possession there is none: *Scranton v. Clark*, 39 N. Y. 220; *Meriden Nat'l Bank v. Callaudet*, 120 N. Y. 299.

All agree that by possession is not meant actual custody, occupation or physical keeping, but includes all constructive possession, such as possession by bailee, or agent of the vendor, etc., the word possession, must have a broad construction: *Whitby v. Haywood*, 6 Cush. 82; *Shattuck v. Green*, 104 Mass. 45.

In New York, the warranty is not broken until the buyer is

discharged in his possession: *Burt v. Dewey*, 40 N. Y. 283; *Bardwell v. Colley*, 45 N. Y. 494.

In this country there is also an implied warranty of *identity*, viz.: that the articles shall be of the kind or species it purports to be, or is described to be; that is, that the article delivered shall be the same thing contracted for. This, in England, is called an implied condition; in America, an implied warranty. In the former country it is called a condition, because the vendee has more right of return in case of breach of condition than he has for breach of warranty, and so it is more favorable for him to hold it a breach of condition. But, as there is in America a generally recognized right of return for breach of warranty, as well as for breach of condition, the practical difference between the two countries is slight.

Warranty of genuineness in the sale of commercial paper comes under this head; a warranty that it really is what it purports to be—a real note, and not a false one. On every such sale the vendor impliedly guarantees (a) that the signatures to the paper are genuine, and not forged: *Herrick v. Whitney*, 15 Johns. 240; *Thrall v. Newell*, 19 Vt. 202; *Worthington v. Coles*, 112 Mass. 30; *Ross v. Terry*, 63 N. Y. 613; *Ward v. Haggard*, 75 Ind. 381. Though, of course, no such warranty is implied when the vendor at the sale expressly refuses to warrant the genuineness: *Bell v. Dagg*, 60 N. Y. 528. The doctrine of *Baxter v. Durand*, 29 Me. 434, and of *Fisher v. Rieean*, 12 Md. 497, that this implied warranty of genuineness of signature does not apply where a note is sold in market, like other goods and effects as an article of merchandise, but only where it passes in payment of a debt, can hardly be supported. In both cases alike, the thing transferred is not what it purports to be, but only a semblance of it. It is not a question of quality, but of kind or species. It is not a contract at all, if forged. And as goods and chattels sold must conform to their name and description, and be what they purport to be, so must a note: *Hussey v. Libley*, 66 Me. 192; *Merriam v. Walcott*, 3 Allen, 258.

(b) That the signers are competent to contract, and not minors, &c.: *Lobdell v. Baker*, 1 Met. 192.

(c) But not ordinarily that they are pecuniarily responsible or solvent ; for this is a warranting of quality of the article : *Day v. Kinney*, 131 Mass. 37 ; *Burgess v. Chapin*, 5 R. I. 225.

There is no doubt, therefore, that the article delivered must correspond in species and kind with that sold: *Lamb v. Crafts*, 12 Met. 353.

Some words of quality may be so positive and definite as not to be merely expressions of opinion or recommendation, but words of positive affirmance. In such cases they may be considered as warranties of quality as well as kind: *Forcheimer v. Stewart*, 65 Iowa, 593; *Chisholm v. Proudfort*, 15 Up. Can. Q. B. 203.

The maxim of *caveat emptor* is universally adopted in America, save, perhaps, in South Carolina, and therefore, in the sale of an existing specific chattel inspected or selected by the buyer, or subject to his inspection, there is no implied warranty of quality; or, as sometimes stated "a sound price does not in and of itself, import of sound quality." The doctrine of *caveat emptor*, however, has so many limitations that it must be read in the light of what are sometimes called exceptions, but which are really independent rules and principles. The purchaser must examine for himself the article offered to him for sale, and exercise his own judgment respecting it. If he purchases without examination or after a hasty examination, or in mere reliance upon the seller, and the article turns out to be defective, it is his own fault, and he has no remedy against the seller unless the latter expressly warrants the article, or made a fraudulent representation concerning it, or knowing it to be defective, used some art to disguise it. This is the leading maxim of law relating to the contract of sale; and its application is not affected by the circumstance that the price is such as is usually given for a sound commodity; 1 *Smith's Leading Cases*, 78; 2 *Kent's Commentaries*, 478.

It seems to have been originally applicable not to the quality but the title of the goods sold. In modern law, however, the rule is, that if the seller has possession of the article and sells it as his own, and not as agent for another, and for

a fair price, he is understood to warrant the title: 2 *Kent's Commentaries*, 478; *Ryan v. Ulmer*, 108 Pa. 332; *Bryant v. Pembrer*, 45 Vt. 487; *Hadley v. Clinton, etc., Co.*, 13 Ohio, 502; *Day v. Poole*, 52 N. Y. 416; *Drew v. Rose*, 41 Conn. 50; *Morris v. Thompson*, 85 Ill. 16; *Bowman v. Clemmer*, 50 Ind. 10; *Richardson v. Bouck*, 42 Iowa, 185; *West v. Cunningham*, 9 Porter (Ala.), 104; *Johnson v. Powers*, 65 Cal. 181.

In South Carolina, from the earliest time, it has been held that "selling for a sound price raises, in law, a warranty of soundness to the seller." The earliest reported cases being: *Fimrod v. Shoolbred*, 1 Bay, 324; *Crawford v. Wilcox*, 2 Mill, 353; *Pulwinkle v. Cramer*, 27 S. C. 376.

Where the parties have not an equal opportunity of examination, but the seller has the better, or where the buyer relies on seller's skill, knowledge, or experience, the risk of quality falls on the seller, and he is said to warrant impliedly the quality of the goods sold.

In sales actually made by sample there is an implied warranty that the bulk shall be of equal quality to the sample: *Hughes v. Gray*, 60 Cal. 284; *Wilcox v. Howard*, 51 Ga. 298; *Webster v. Granger*, 78 Ill. 230; *Myer v. Wheeler*, 65 Iowa, 390; *Proctor v. Spratley*, 78 Va. 254; *Osborne v. Gantz*, 60 N. Y. 540.

In sales by sample there is no warranty that there is no *latent defect* in the sample or in the bulk; they must be alike, but neither of them need be perfect. We speak of sellers merely; whether it be otherwise or not as to manufacturers, we will examine later; *Bradley v. Manly*, 13 Mass. 139.

But there may be an express warranty of quality in goods sold by sample as well as in other cases, and in such instances a breach of the warranty of quality is actionable, although the goods might be equal to the sample: *Goold v. Stein*, 149 Mass. 570.

In *DeWitt v. Berry*, 134 U. S. 306, it was held that no implied warranty of quality exists in sales by sample. Pennsylvania, however, has a modified rule on this subject, holding apparently that an ordinary sale by sample does not imply any warranty that the quality of the bulk shall be the same as that

of the sample, but only that the bulk must be of the same species or kind as the sample, and also shall be merchantable: *Boyd v. Wilson*, 83 Pa. 319; *West Republic Co. v. Jones*, 108 Pa. 55.

To constitute a sale by sample in the legal sense of the term, it must appear that the parties contracted solely in reference to the sample or article exhibited, and that both mutually understood they were dealing with the sample, with an understanding that the bulk was like it: *Beirne v. Dord*, 5 N. Y. 95; *Day v. Raquet*, 14 Minn. 282.

Or, as sometimes stated, to raise the implied warranty of conformity between sample and bulk, it must appear that the alleged sale by sample was really such; that the portion shown was intended and understood to be a standard of the quality and not merely that it was in fact taken from the bulk. If that was all that was understood, it would not raise the implied warranty. Merely showing a portion of the goods instead of the whole, does not necessarily constitute a sale by sample: *Selser v. Roberts*, 105 Pa. 242; *Proctor v. Spratley*, 78 Va. 254; *Ames v. Jones*, 77 N. Y. 614.

Whether a sale was strictly by sample, or whether the buyer acted on his own judgment is ordinarily a question for the jury: *Waring v. Mason*, 18 Wend. 445.

When implied warranties arise:

(1) In a sale of goods by description there is a double warranty. (a) that the goods shall correspond to the description, and (b) that the goods shall be of a merchantable quality and condition: *Hawkins v. Pemberton*, 51 N. Y. 198; *Walcott v. Mount*, 36 N. J. Law, 262; *Morse v. Union Stock Yards Co.*, 21 Ore. 289; *Murchie v. Cornell*, 155 Mass. 50; *Chalmer's Digest*, § 16.

As to the first proposition, Rogers, J., in *Borrekins v. Bevan*, 3 Rawle, 23, 43, said: "In all sales there is an implied warranty that the article corresponds in specie with the commodities sold. It may be safely ruled, that a sample or description in a sale-note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty, that the goods are what they are described, or represented to be by the vendor."

There is no doubt that in a contract of sale words of description are held to constitute a warranty that the articles sold are of the species and quality so described: *Hogins v. Plympton*, 11 Pick. 97; *Windsor v. Lombard*, 18 Pick. 57; *Bach v. Levy*, 101 N. Y. 511; *Fleck v. Weatherton*, 20 Wis. 392; *Webber v. Davis*, 44 Me. 147.

As an inspection of the goods is necessary to enable the buyer to ascertain whether they answer the description by which they were sold, it follows that the seller is bound to give the buyer an opportunity to make such inspection, and an acceptance for that purpose will not be a waiver of the right to object: *Doane v. Dunham*, 79 Ill. 131.

Goods not equal to sample or description, may be rejected by the buyer, but if he accepts them he may recover on the warranty: *Cox v. Long*, 69 N. C. 7; *Rogers v. Niles*, 11 Ohio, 48; *Field v. Kinnear*, 4 Kan. 476; *Boothby v. Plaisted*, 51 N. H. 436.

As to the second proposition, their merchantable quality and condition, we find, where goods are sold by description and not by the buyers selection or order, and without any opportunity for inspection, there is ordinarily an implied warranty, not only that they conform to the description in kind and species as before stated, but also that they are merchantable; not that they are of the first quality or the second quality, but that they are not so inferior as to be unsalable among merchants or dealers in the article; *i. e.*, that they are free from any remarkable defects. In such sales the doctrine of *caveat emptor* does not apply. This is especially true where the vendor is the manufacturer, or the sale is executory for future delivery: *Gallagher v. Waring*, 9 Wend. 28; *Brantley v. Thomas*, 22 Tex. 270; *McClung v. Kelly*, 21 Iowa, 508; *Fogel v. Brubaker*, 122 Pa. 15; *Hood v. Block*, 29 W. Va. 445.

An exception to this rule was held to exist in *Chicago, etc., Co. v. Tilton*, 87 Ill. 180, where both parties were dealers in a board of trade, under rules providing that one who took property without inspection, took it at his own risk. This implied warranty of merchantability by a manufacturer, has sometimes been implied even when there was express warranties as

to other qualities, which were silent on this particular subject: *Wilcox v. Owens*, 64 Ga. 601; *Merriam v. Field*, 24 Wis. 640.

But in a recent case, in the Supreme Court of the United States, it was held that an express warranty of quality, excludes any implied warranty of merchantability, especially if accompanied by the delivery and acceptance of a sample as such: *DeWitt v. Berry*, 134 U. S. 306; *Cosgrove v. Bennett*, 32 Minn. 371.

(2) Where the buyer, relying on the seller's skill or judgment, orders goods for a particular purpose, known to the seller, which is in the course of seller's business to supply, there is an implied warranty that the goods shall be fit for such purpose: *Chalmer's Digest*, § 17; *Randall v. Newson*, 2 Q. B. Div. 102; *Hoe v. Sanborn*, 21 N. Y. 552; *Rodgers v. Niles*, 11 Ohio, 48.

In purchases for a particular use made known to the seller, if the buyer relies on the vendor's judgment to select, and not on his own, there is an implied warranty that the article furnished is reasonably fit and suitable for that purpose: *Morse v. Union Stock Yard Co.*, 21 Ore. 289.

This is more obvious when the seller is also the manufacturer, but it is equally true when he is only a merchant; provided always, that the buyer in fact relies upon the seller's judgment, and does not inspect for himself: *Dushane v. Benedict*, 120 U. S. 630.

As example, a sale of barrels to be filled with whiskey, implies that they will not leak: *Poland v. Miller*, 95 Ind. 387; *Pacific Iron Works v. Newhell*, 34 Conn. 67; *Howard v. Hoey*, 33 Wend. 350; *Rease v. Sabin*, 38 Vt. 432; *Byers v. Chapin*, 28 Ohio, 300.

It must be distinctly borne in mind, however, that this implied warranty of fitness does not arise (in the absence of fraud) when the buyer selects his own articles on his own judgment, although the vendor (not being a manufacturer) knows it is intended for a particular purpose. If the purchaser gets the exact article he buys, and buys the very thing he gets, he takes the risk of fitness for the intended use: *Deming v. Foster*, 48 N. H. 165; *Height v. Bacon*, 126 Mass.

10; *Walker v. Pue*, 57 Md. 155; *Armstrong v. Bufford*, 51 Ala. 410; *Port Carbon Iron Co. v. Groves*, 68 Pa. 149.

(3) In a sale by a manufacturer there is an implied warranty that the goods are of the seller's own manufacture: *Chalmer's Digest*, § 17; *Johnson v. Raylton*, 7 Q. B. Div. 438.

(4) In addition to all other implied warranties, it is possible that custom and usage, if sufficiently well established, may modify, enlarge, or restrict warranties usually created by law. Thus, in *Schnitzner v. Oriental Print Works*, 144 Mass. 123, it was held that, in a sale of Persian berries in bags by sample, a custom might be shown that the sample represented only the average quality of the entire lot, and not the average quality of the contents of each bag taken separately; if so, the buyer would have no remedy merely because the average of one bag fell below the sample, if in fact the average of the entire quantity, taken as whole, did conform to the standard. But a usage that in sales by sample there is an implied warranty against latent defects is invalid and illegal: *Dickinson v. Gay*, 7 Allen, 29; *Coxe v. Heisley*, 19 Pa. 243.

So a usage that plain words of representation, merely in their ordinary sense, shall be understood as words of warranty is invalid: *Weatherill v. Nilesen*, 20 Pa. 448.

Conversely, a usage derogating from the common law rule of implied warranties is invalid; as a usage that a manufacturer does not impliedly warrant against latent defects in the article he is manufacturing is inoperative against a written contract from which the law would imply such warranty: *Whitmore v. South Boston Iron Co.*, 2 Allen, 52.

Remedies:

A right of action for breach of warranty exists, although the vendor had expressly agreed to take back the property in case it did not correspond with the warranty. The right to return is merely accumulative remedy: *Douglass Axe Co. v. Gardner*, 10 Cush. 88; *Perrine v. Serrell*, 30 N. J. Law, 454; *McCormack v. Dunville*, 36 Iowa, 645. Unless the buyer expressly agrees that the thing shall be returned if defective, in which case he may not have a right to keep it and sue on the warranty: *Bomberger v. Griener*, 18 Iowa, 477. And,

although the buyer has exercised his right of return, an action for breach of warranty will lie for any actual damages thereby sustained before such return: *Clark v. McGatchie*, 49 Iowa, 437; *Kimball v. Vorman*, 35 Mich. 310.

The mere fact of acceptance and use of the goods, even after knowledge of the defect, does not prevent a resort to an action upon a warranty, or for fraud. The buyer need not return them, nor offer to do so, nor give any notice, in order to sue upon his warranty: *Wareing v. Mason*, 18 Wend. 426; *Vincent v. Leland*, 100 Mass. 432; *Fisk v. Tank*, 12 Wis. 277; *Hughes v. Bray*, 60 Minn. 284; *Kellogg v. Denslow*, 14 Conn. 411.

No doubt a failure to return the goods or notify the vendor of the defect after sufficient opportunity to examine them, may be some evidence that no defect existed, but it is not a condition precedent to the action, nor in law, a waiver of the warranty, though some states seem to hold it so, especially in executory contracts, and when the defects are apparent: *Dounce v. Dow*, 64 N. Y. 411; *Defenbaugh v. Weaver*, 87 Ill. 132. But it seems to be a question of fact for the jury in each case, under proper instructions from the court.

An action for a breach of warranty may be maintained although the goods are not paid for, or though notes for the price are still outstanding: *Aultman v. Wheeler*, 49 Iowa, 647; *Frohreich v. Gammon*, 28 Minn. 476; *Creighton v. Comstock*, 27 Ohio, 548. Or, although the buyer has sold the goods and no claim has been made on him for the alleged defects: *Muller v. Eno*, 14 N. Y. 598.

An action may legally be sustained upon a warranty, although the buyer allows the seller to recover judgment for the full price because he did not set up the defence. The failure to rely upon the defect is only a matter of evidence as to the non-existence of such defence: *Bodurtha v. Phelon*, 13 Gray, 413. and *vice versa*: *Barker v. Cleveland*, 19 Mich. 230. But no action will lie on a warranty unless the title has fully passed to the buyer.

The general rule of damages in actions upon a warranty is too well settled to require citation, viz: the value of an article

corresponding to the warranty, minus the value of the article actually received. And this seems to be so both in express and implied warranties: *Cohers v. Keever*, 4 Pa. 168; *Comstock v. Hutchinson*, 10 Barb. 211; *Rutan v. Ludlam*, 29 N. J. Law, 398.

And it is immaterial that the purchaser subsequently sold the article for a higher price than he paid: *Brown v. Bigelow*, 10 Allen, 242.

As to special or consequential damages not quite so much unanimity exists: See *Thoms v. Dingsley*, 70 Me. 100. In that case the expense of taking out defective carriage springs and inserting others in their place was allowed.

In a sale of seeds to a market gardener, known to be for his own use, that being considered an implied warranty of fitness for that special use, the buyer may recover as damages the difference between the value of the crop raised from the seed and the value of what a crop would have been raised from such seed as they were warranted to be: *Woolcott v. Mount*, 36 N. J. Law, 262; *White v. Miller*, 71 N. Y. 118; *VanWyck v. Allen*, 69 N. Y. 61.

Gains prevented, as well as losses sustained, may be sometimes recovered if they can be clearly established by the evidence as natural results of the breach of warranty. *Griffin v. Colver*, 16 N. Y. 489; *Messmore v. N. Y. Steel and Lead Co.*, 40 N. Y. 422.

EDGAR H. ROSENSTOCK.

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